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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Michele Leuthauser,

Plaintiff,

V.

United States of America,

Defendant.

Case No. 2:20-cv-00479-JCM-MDC

Supplemental Brief to United States' Motion for Summary Judgment

I. Introduction

The United States submits the following supplemental brief to its Motion for Summary Judgment (ECF No. 91) regarding Plaintiff Michele Leuthauser’s civil battery and intentional infliction of emotional distress (“IIED”) claims pursuant to the Federal Tort Claims Act (“FTCA”). *See* ECF No. 119. Plaintiff’s lawsuit arises out of her pat-down at a Transportation Security Administration (“TSA”) security screening checkpoint at Harry Reid International Airport (“LAS”) on June 30, 2019. For purposes of brevity and judicial economy, the United States relies on its prior Introduction and Statement of Undisputed Statement of Facts (“SOF”) contained its Motion for Summary Judgment. *Id.* The SOF will be cited throughout this brief.

II. Legal Standards

A. Fed. R. Civ. P. 12(h)(3)

26 The United States, as a sovereign entity, is immune from suit except insofar as it
27 consents to be sued. *Lehman v. Nakshian*, 453 U.S. 156, 160–61 (1981) (quoting *U.S. v.*
28 *Testan*, 424 U.S. 392, 399 (1976)). Statutes granting subject-matter jurisdiction “are to be

1 construed strictly in favor of the sovereign.” *McMahon v. United States*, 342 U.S. 25, 27
 2 (1951); *see also Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143 (9th Cir. 1987).
 3 “If the court determines at any time that it lacks subject-matter jurisdiction, the court must
 4 dismiss the action.” Fed. R. Civ. P. 12(h)(3); *see also MacKay v. Pfeil*, 827 F.2d 540, 543 (9th
 5 Cir. 1987).

6 **B. Fed. R. Civ. P. 56**

7 “Summary judgment shall be granted when ‘there is no genuine dispute as to any
 8 material fact and the movant is entitled to judgment as a matter of law.’” *Thomas v. United*
 9 *States*, No. 2:15-cv-00291-APG-NJK, 2017 WL 379425, at *2 (D. Nev. Jan. 25, 2017)
 10 (citation omitted); *see also* Fed. R. Civ. P. 56(a). “The moving party ‘has the initial burden
 11 of showing the absence of a genuine issue of material fact.’” *Id.* (citation omitted). “A
 12 material issue of fact is one that affects the outcome of the litigation and requires a trial to
 13 resolve the differing version of events.” *Id.* (citations omitted). “Once the moving party
 14 satisfies its initial burden, the burden shifts to the non-moving party to set forth specific
 15 facts showing that there is a genuine issue for trial.” *Id.* (citations omitted). “The non-
 16 moving party ‘may not rely on denials in the pleadings but must produce specific evidence,
 17 through affidavits or admissible discovery material, to show that the dispute exists.’” *Id.*
 18 (citation omitted). The non-moving party “must do more than simply show that there is
 19 some metaphysical doubt as to the material facts.” *Bhan v. NME Hosps., Inc.*, 929 F.2d
 20 1404, 1409 (9th Cir. 1991) (citation omitted). “Where there is a complete failure of proof
 21 on an essential element of the nonmoving party’s case, all other facts become immaterial,
 22 and the moving party is entitled to judgment as a matter of law.” *Petzak v. Nevada ex rel.*
 23 *Dep’t of Corr.*, 579 F. Supp. 2d 1330, 1334 (D. Nev. 2008) (citation omitted). *See also Celotex*
 24 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

25 **III. Argument**

26 **A. The Discretionary Function Exception Bars Plaintiff’s FTCA Claims.**

27 Plaintiff complains that TSA employee Anita Serrano acted inappropriately when
 28 she performed a pat-down of Plaintiff in a way Plaintiff described as “forceful” and that

1 included contact with her genitals. Plaintiff's claims, however, address aspects of pre-flight
2 screening that are susceptible to policy judgments and must be insulated from judicial
3 scrutiny.

4 **1. The discretionary function exception**

5 The FTCA's waiver of sovereign immunity is limited by the discretionary function
6 exception, which precludes claims against the United States and its employees "based upon
7 the exercise or performance or the failure to exercise or perform a discretionary function or
8 duty on the part of a federal agency or an employee of the Government, whether or not the
9 discretion involved be abused." 28 U.S.C. § 2680(a). "It is designed to 'prevent judicial
10 'second-guessing' of legislative and administrative decisions grounded in social, economic,
11 and political policy through the medium of an action in tort.'" *Chadd v. United States*, 794
12 F.3d 1104, 1108 (9th Cir. 2015) (citation omitted). "Where the exception applies, the United
13 States has not waived its sovereign immunity and [federal courts] lack subject matter
14 jurisdiction over the claims." *Gonzalez v. United States*, 814 F.3d 1022, 1027 (9th Cir. 2016)
15 (citation omitted).

16 In determining whether the challenged conduct falls within the discretionary
17 function exception, the Ninth Circuit follows a two-part test. *Nieves Martinez v. United States*,
18 997 F.3d 867, 876 (9th Cir. 2021). "First, we ask whether the challenged actions involve 'an
19 element of judgment or choice.'" *Id.* (quoting *United States v. Gaubert*, 499 U.S. 315, 322). If
20 a "federal statute, regulation, or policy specifically prescribes a course of action for an
21 employee to follow[]," the act is not discretionary because "the employee has no rightful
22 option but to adhere to the directive." *Id.* (citing *Berkovitz v. United States*, 486 U.S. 531, 536).
23 If the court determines that "the challenged actions involve an element of choice or
24 judgment," the court then "determine[s] 'whether that judgment is of the kind that the
25 discretionary function exception was designed to shield.'" *Id.* (citations omitted) "More
26 specifically, if the judgment involves considerations of social, economic, or political policy,
27 the exception applies." *Id.*

1 “If a defendant can show that the tortious conduct involves a ‘discretionary
 2 function,’ a plaintiff cannot maintain an FTCA claim, even if the discretionary act
 3 constitutes an intentional tort under § 2680(h).” *Gasho v. United States*, 39 F.3d 1420, 1434
 4 (9th Cir. 1994).

5 **2. The particular TSA screening procedures at issue here involve
 discretion, judgment, and choice.**

6 The first step of the discretionary function analysis is satisfied if no “federal statute,
 7 regulation, or policy specifically prescribes a course of action for an employee to follow.”
 8 *Morales v. United States*, 895 F.3d 708, 713 (9th Cir. 2018) (citation omitted).

9 TSA, in order to meet its general mandate in 49 U.S.C. § 44901 to “provide for the
 10 screening of all passengers,” created a set of Screening Checkpoint Standard Operating
 11 Procedures which are applicable nationwide. ECF No. 91-2, Ex. A ¶ 13. *See also* 49 U.S.C.
 12 § 114(f)(3) (“additional powers and duties” of the TSA Administrator include “develop[ing]
 13 policies, strategies, and plans for dealing with threats to national security”); 49 U.S.C.
 14 § 44903(b)(3) (instilling TSA Administrator with power to “prescribe regulations to protect
 15 passengers and property on an aircraft” to include “a uniform procedure for searching”
 16 passengers to endure their safety). In other words, there is “no ‘federal statute, regulation, or
 17 policy [that] specifically prescribes a course of action for an employee to follow’ when
 18 conducting” security screening – the TSA Administrator is charged with creating such a
 19 scheme. *Nieves Martinez*, 997 F.3d at 876 (citing *Berkovitz*, 486 U.S. at 536). Accordingly, the
 20 appropriateness of TSA’s security screening procedures as applied here – in other words,
 21 whether Serrano needed to conduct a pat-down of Plaintiff and how she performed the pat-
 22 down – satisfies the first prong of the discretionary function analysis.

23 **3. The alleged acts or omissions are susceptible to policy analysis.**

24 In the second step of the discretionary function analysis, courts “consider whether
 25 the discretion ‘is of the kind that the discretionary function exception was designed to
 26 shield’—namely, ‘only governmental actions and decisions based on considerations of
 27 public policy,’” which typically refers to considerations grounded in social, economic, and
 28 political policy. *Morales*, F.3d at 713-14 (citation omitted). The “focus of the inquiry is not

1 on the agent's subjective intent in exercising the discretion . . . but on the nature of the
 2 actions taken and on whether they are susceptible to policy analysis.”” *Chadd*, 794 F.3d at
 3 1109 (citation omitted).

4 TSA’s security screening processes and how TSA trains its screening employees to
 5 conduct a pat-down and address the concerns of reluctant or anxious passengers fall within
 6 this policy realm. *See Plater v. United States*, 359 F. Supp. 3d 930, 941 (C.D. Cal. 2018) (citing
 7 *Cloes v. City of Mesquite*, 582 F. App’x 721, 727 (9th Cir. 2014)). “The Ninth Circuit has
 8 repeatedly found that decisions relating to training, hiring, and supervision ‘fall squarely
 9 within the discretionary function exception.’” *McSwain v. United States*, 2017 WL 901772 (D.
 10 Nev. Mar. 7, 2017) (dismissing negligent training claim regarding TSA canine handler).

11 When confronted with a reluctant, anxious passenger, Serrano followed her training
 12 and attempted to complete the pat-down as efficiently as possible. ECF No. 91-7, Ex. C,
 13 Serrano Dep., 9:15-24; 31:18-24; 50:3-22; 52:9-25; 58:23-25; 59:5-18; 61:1-5. TSA pat-downs
 14 can necessarily extend to touching sensitive areas of a passenger’s body, including the
 15 pelvis, buttocks, and inner thighs, and pat-downs must be done with sufficient pressure to
 16 ensure that there are no prohibited items concealed on the passenger. ECF No. 91-2, Ex. A.
 17 ¶¶ 24-25. The amount of force required is determined by the screener performing the pat-
 18 down. *Id.* at ¶ 25. Because the discretionary-function exception applies here, the United
 19 States is entitled to dismissal of Plaintiff’s tort claims.

20 **B. The United States is Entitled to the Defense of Privilege.**

21 The defense of privilege applies to any asserted tort and extends to acts that are
 22 “necessary for the protection of some interest of the actor or of the public which is of such
 23 importance as to justify the harm caused or threatened by its exercise,” or where the
 24 defendant “is performing a function for the proper performance of which freedom of action
 25 is essential.” Restatement of Torts § 10(2)(b) and (c). Privilege extends to non-consensual
 26 acts “based either upon the value attached to the interest to be protected or advanced by
 27 their exercise, or upon the necessity of giving to certain functionaries that freedom of action
 28 necessary to the proper performance of their functions.” *Id.* at Comment d. The acts subject

1 to this defense are protected if “done for the purpose of protecting or advancing the
 2 particular interest.” *Id.* “Nonconsensual privileges are given by law for the protection of the
 3 interests of the actor, of third persons or of the public.” Restatement of Torts § 890,
 4 Comment a.

5 Under this doctrine, a TSA screener’s action would be privileged if the screener were
 6 in compliance with the Fourth Amendment as determined by federal law. *Cf. Rhoden v.*
 7 *United States*, 55 F.3d 428, 431–32 (9th Cir. 1995) n. 5 (9th Cir. 1995) (explaining that
 8 privilege stems from the intersection of constitutionality and the elements of the alleged
 9 tort). Serrano’s pat-down of Plaintiff to clear alarms falls within the Fourth Amendment’s
 10 contours; the Ninth Circuit has determined that TSA screening prior to commercial flight is
 11 indeed constitutional under the administrative search doctrine “provided that it ‘is no more
 12 extensive nor intensive than necessary, in light of current technology, to detect the presence
 13 of weapons or explosive [and] that is confined in good faith to that purpose.’” *United States*
 14 *v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007).

15 Plaintiff subjectively found the circumstances of her pat-down “uncomfortable.”
 16 ECF No. 91, SOF ¶¶ 56, 59. Plaintiff describes the pressure used in her pat-down as
 17 “forceful” and “painful,” and that the pat-down included contact between the edge of
 18 Serrano’s hand with her genitals where the leg meets resistance from the torso. ECF No. 91,
 19 SOF ¶¶ 63-64.¹ Personal discomfort with the circumstance of a required pat-down, however,
 20 does not make the pat-down unconstitutional.

21 Plaintiff describes adverse reactions and responses to a pat-down procedure that is
 22 permissible under the Fourth Amendment. *See, e.g., United States v. Marquez*, 410 F.3d 612,
 23 618 (9th Cir. 2005). *See also* ECF No. 91-2, Ex. A. ¶ 25. Irrespective of how subjectively
 24 uncomfortable she found the experience, Plaintiff offers no objective indication that her
 25 screening departed from the necessary elements of a permissible pat down. Her efforts to
 26 imbue the process with impermissible intent rests on subjective characterizations about the
 27

28 ¹ Serrano disputes Plaintiff’s account of where she was touched. ECF No. 91 at SOF ¶ 63 n.7.

1 location and forcefulness of the touching necessary to ensure no prohibited items were
 2 concealed on her person. From an objective standpoint, the evidence is consistent with a
 3 pat-down pursuant to TSA's procedures.² As a result, the United States is entitled to invoke
 4 the defense of privilege to defeat Plaintiff's intentional tort claims.

5 **C. Plaintiff is Unable to Establish a Claim for IIED.**

6 **1. Defendant's conduct was not extreme or outrageous.**

7 The FTCA claims are governed by Nevada law as the state where the allegedly
 8 tortious act occurred. *See Louie v. United States*, 776 F.2d 819, 824 (9th Cir. 1985); 28 U.S.C.
 9 §§ 1346(b)(1), 2674. Under Nevada law, to prevail on an IIED claim, a plaintiff must prove
 10 (1) extreme and outrageous conduct; (2) intent or reckless disregard for the causing of
 11 emotional distress; (3) severe or extreme emotional distress; and (4) causation. *Evans v.*
 12 *Lander Cty. Hosp. Dist.*, No. 3:19-cv-00464-LRH-WGC, 2021 WL 1933933, at *6 (D. Nev.
 13 May 13, 2021) (citing *Star v. Rabello*, 625 P.2d 90, 91-92 (Nev. 1981)).

14 “[E]xtreme and outrageous conduct is that which is ‘outside all possible bounds of
 15 decency’ and is regarded as ‘utterly intolerable in a civilized community.’” *Maduike v. Agency*
 16 *Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998). Stress or humiliation alone does not support a
 17 claim for IIED. *See Kennedy v. Carriage Cemetery Services, Inc.*, 727 F. Supp. 2d 925, 933 (D.
 18 Nev. 2010). Liability for emotional distress generally does not extend to ““mere insults,
 19 indignities, threats, annoyances, petty oppressions, or other trivialities.”” *Candelore v. Clark*
 20 *County Sanitation Dist.*, 752 F. Supp. 956, 962 (D. Nev. 1990) (quoting Restatement (Second)
 21 of Torts § 46 cmt. D (1965), *aff'd*, 975 F.2d 588 (9th Cir. 1992)).

22 TSA's screening equipment alarmed in three areas on Plaintiff. ECF No. 91, SOF ¶
 23 38. Because of these alarms, TSA policy required a localized pat-down of these areas to
 24 ensure no prohibited items were present. ECF No. 91, SOF ¶¶ 18-21. During that process,
 25 incidental contact with the genitals could occur. ECF No. 91, SOF ¶ 30. While Plaintiff's
 26

27 ² To the extent that Plaintiff challenges the pat-down procedure itself, such a challenge is
 28 foreclosed by 49 U.S.C. § 46110(a), which requires challenges to TSA's orders to be heard in
 the U.S. Courts of Appeals.

1 Complaint, ECF No. 4, embellishes the allegations to suggest a sexual battery, Plaintiff
 2 specifically testified that she never stated she was “fondled” by Serrano, nor did Plaintiff
 3 even know what the word “fondle” meant. ECF No. 91-12, Ex. H, Leuthauser Dep. at
 4 118:6-19:1-11.

5 At its core, Plaintiff’s claim arises from her misperception of the situation: that her
 6 pat-down was not necessary and that Serrano was abrasive. Even assuming Plaintiff’s
 7 account of the pat-down is true and the pat-down was forceful and included contact with her
 8 genitals, there is no evidence to support that this conduct that was extreme and outrageous
 9 to support a claim for IIED.

10 **2. Plaintiff cannot show causation.**

12 Nevada uses a sliding-scale approach to proving a claim for IIED. Under the sliding-
 13 scale approach, while medical evidence is one acceptable manner in establishing that severe
 14 emotional distress was suffered for purposes of an IIED claim, other objectively verifiable
 15 evidence may suffice to establish a claim when the defendant’s conduct is more extreme. *See*
 16 *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125, 148 (Nev. 2014), vacated on other grounds
 17 by *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016)). “[E]xpert causation testimony
 18 is not required where ‘the connection is a kind that would be obvious to laymen, such as a
 19 broken leg from being struck by an automobile.’” *Alfaro v. D. Las Vegas, Inc.*, No. 2:15-cv-
 20 012190-MMD-PAL, 2016 WL 4473421, at *15 (D. Nev. Aug. 24, 2016) (quotations
 21 omitted). However, when “the cause of injuries is not immediately apparent, the opinion as
 22 to the cause should be given by one qualified as a medical expert.” *Elliott v. Prescott*
 23 *Companies, LLC*, No. 2:15-cv-01143-APG-VCF, 2018 WL 3731087, at *5 (D. Nev. Aug. 6,
 24 2018), appeal dismissed *sub nom. Elliott v. Oakridge Indus., Inc.*, No. 18-16557, 2018 WL
 25 7298162 (9th Cir. Dec. 4, 2018) (citing *Lord v. State*, 806 P.2d 548, 551 (1991)).

26 After her pat-down concluded, Plaintiff spoke with Officer Dempsey Lauderdale of
 27 the Las Vegas Metropolitan Police Department, assigned to provide law enforcement
 28 support at LAS. ECF No. 91-10, Ex. F, Lauderdale Dep., 8:14-17, 10:21-11:1. Officer

1 Lauderdale described Plaintiff as “very somber” as she explained she “went through the
 2 screening process and was very uncomfortable with the process.” *Id.* at 16:11-18. Plaintiff
 3 also spoke with her husband, describing herself as stunned, shaky, and embarrassed at the
 4 time. ECF No. 91-12, Ex. H, Leuthauser Dep., 144:14-18. Her husband described her as
 5 “very distraught.” Ex. N hereto, Leuthauser depo., 25:17. Nothing in these descriptions
 6 would lead one to conclude that the connection between her pat-down and her IIED would
 7 be obvious to laymen.

8 Plaintiff had complex pre-existing mental health issues before June 30, 2019, for
 9 which she regularly sought mental health treatment. ECF No. 91, SOF ¶¶ 73-74. Plaintiff
 10 testified that the pat-down “exacerbated” her pre-existing emotional state. *Id.*, SOF ¶ 75.
 11 Plaintiff continued mental health treatment regularly after June 30, 2019. *Id.*, SOF ¶ 74.
 12 However, Plaintiff did not identify or designate any expert or mental health professional to
 13 testify on her behalf in the case to opine that her mental health complaints were exacerbated
 14 by the pat-down. Plaintiff intends to testify on her own behalf. *Id.*, SOF ¶ 79 (citing
 15 Plaintiff’s Fed. R. Civ. P. 26 disclosure of witnesses with relevant knowledge of claims and
 16 defenses).

17 Plaintiff is not a mental health expert, and it is not sufficient for Plaintiff to testify on
 18 the issue as to what, if anything, was exacerbated. To demonstrate causation, Plaintiff
 19 needed to properly disclose a mental health expert. Because Plaintiff is unable to establish
 20 that the pat-down was a causal connection to her alleged emotional distress, her IIED claim
 21 fails.

22 **D. Plaintiff Failed To Properly Identify and Disclose Her Alleged Damages.**

23 Assuming Plaintiff can overcome the evidentiary burden discussed above, she
 24 altogether failed to properly disclose and compute her alleged damages. Accordingly,
 25 Plaintiff should not be permitted to introduce additional evidence supporting her damages
 26 calculation.

27 Litigants must include a computation of damages in their initial disclosures. *Munn*
 28 *v. Hotspur Resorts Nevada, Inc.*, No. 2:19-cv-00693-GMN-NJK, 2020 WL 7323345, at *1 (D.

1 Nev. Oct. 20, 2020). Rule 26 also requires the disclosing party to “make available the
2 supporting documents” for its damages’ computation. Advisory Committee Notes to 1993
3 Amendments. The disclosing party has a duty to supplement incomplete or inaccurate
4 disclosures “in a timely manner.” Fed. R. Civ. P. 26(e); *see also Jackson v. United Artists*
5 *Theatre Cir., Inc.*, 278 F.R.D. 586, 593 (D. Nev. 2011).

6 Plaintiff neglected to produce a computation of damages. ECF No. 91, SOF ¶ 78.
7 Instead, Plaintiff only disclosed that she is seeking “5 figures” even though her lost wages
8 are “practical to compute.” *Id.* While Plaintiff’s discovery responses note an “ongoing”
9 damage of \$2900 a month, when asked under oath during her deposition to quantify her
10 damages, she could not specify what wages she had lost. ECF No. 91, SOF ¶¶ 72, 78.
11 Plaintiff’s discovery responses further neglected to properly quantify her purported
12 damages. *See id.* (ECF No. 91, Ex. K Nos. 2 and 8 and Ex. M Nos. 2 and 8). Plaintiff should
13 not now, at this late date, be permitted to produce evidence of her damages.

14 **IV. Conclusion**

15 For the reasons stated above and in its original Motion, Defendant United States
16 respectfully requests dismissal of Plaintiff’s tort claims or, in the alternative, summary
17 judgment as to her IIED claim and an inability to introduce supplemental evidence
18 calculating her damages.

19 Respectfully submitted this 1st day of February 2024.

20 JASON FRIERSON
21 United States Attorney

22 /s/ R. Thomas Colonna
23 R. THOMAS COLONNA
24 Assistant United States Attorney